United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. **74-2229**

UNITED STATES OF AMERICA — Plaintiff-Appellee

v.

JACK REX PIGMAN — Defendant-Appellant

Appeal from the United States District Court for the District of Vermont

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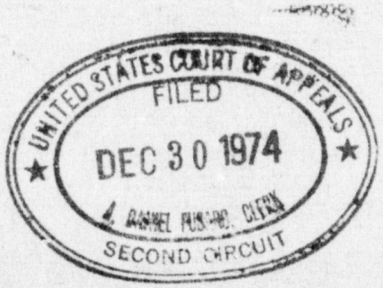
BRIEF FOR THE UNITED STATES

GEORGE W. F. COOK
United States Attorney
District of Vermont



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STATEMENT OF THE CASE

On November 7, 1967, an indictment was brought against defendant Jack Rex Pigman and co-defendants Dennis Rathburn, Lester Van Blericom, Richard Kloberdance and Mary Lee Butts, charging each in three counts, viz., COUNT I, causing a falsely made and forged security to be transported in interstate commerce (18 U.S.C. §2314); COUNT II, conspiring to violate Section 2314 (18 U.S.C. §371); and COUNT III, possessing an unregistered sawed-off shotgun (26 U.S.C. §§5841 and 5851).

Prior to trial in December 1967 before the late Honorable Ernest W. Gibson, Chief Judge of the United States District Court for the District of Vermont, defendants Van Blericom, age 22, and Kloberdance, age 21, pled guilty to Counts II and III, and Count I was eventually dismissed as to these two defendants. Trial proceeded against the remaining three defendants, with the jury on December 15, 1967, returning a verdict against Pigman, age 29, Rathburn, age 35, and Butts, age 19, on all three counts.

Defendants Pigman and Rathburn were each sentenced by Chief Judge Gibson on January 22, 1968 as

follows: COUNT I, ten years; COUNT II, five years consecutive, and on COUNT III, five years consecutive, execution suspended and probation for five years to commence upon completion of sentences on Counts I and II. Defendants Van Blericom and Kloberdance were each sentenced to five years on Count II and five years on Count III, with execution suspended on Count III, and probation for five years to commence upon completion of the sentences on Count II. Count I was dismissed as to Van Blericom and Kloberdance. Defendant Mary Lee Butts was sentenced on Count I and II under the Youth Correction Act, as a young offender, and given a five year suspended sentence on Count III. Count III was thereafter dismissed as to all defendants by Chief Judge Gibson on December 19, 1968, following the U. S. Supreme Court's decision in Haynes v. United States, 390 U.S. 85 (1968), declaring the applicable statutory provisions underlying Count III as unconstitutional.

Following sentencing, defendants Pigman and Rathburn appealed their convictions on Count I and II, which convictions were affirmed by a decision of the Second Circuit Court of Appeals on August 21, 1969. See United States v. Rathburn and Pigman, 414 F.2d 767

(2d Cir. 1969), cert. denied, 399 U.S. 912, (1970). On November 6, 1970, the late Honorable Bernard J. Leddy, Chief Judge of the United States District Court for the District of Vermont, acting on Pigman's Rule 35 Motion for Reduction of Sentence, ordered Pigman's sentence reduced to three years on Count II, to be served concurrently with the ten year sentence on Count I. Count I was left at ten years.

On January 17, 1972, (App. p. 50), Pigman was paroled from the U.S. Penitentiary at Leavenworth, Kansas. Thereafter on March 14, 1972, Pigman was arrested by the Cedar Rapids, Iowa, Police Department and charged with breaking and entering. A federal parole violator warrant was issued on the Vermont charges but Pigman made bail prior to the disposition of the Cedar Rapids, Iowa charges. On July 10, 1972, Pigman was again arrested by Cedar Rapids police charging Pigman with breaking and entering on June 14, 1972, (App. p. 50). Pigman was held in State custody in Iowa from July 10, 1972 to November 21, 1972 on which day he pled guilty in District Court, Cedar Rapids, Iowa, to two counts of breaking and entering (on March 14, 1972 and June 14, 1972). Pigman was sentenced to serve one year in Linn County, Iowa jail on

the State charges (App. p. 50). While serving his County Jail sentence, Pigman escaped on work release on April 13, 1973. Pigman was apprehended in Omaha, Nebraska on April 29, 1973. A federal parole violator warrant was executed on May 2, 1973, charging Pigman with several violations. (App. p. 50). Pigman denied some violations but expressly admitted: (1) Associating with persons engaged in criminal activities June 14, 1972; (2) Breaking and entering resulting in his one year sentence to County Jail in Cedar Rapids on November 21, 1972; and (3) Escaping from Linn County Jail authorities. (App. pp. 50 and 51). On June 30, 1973, Pigman was returned to Leavenworth to serve the remainder of his Vermont sentence.

On September 11, 1973, defendant Pigman filed a Motion under 28 U.S.C. §2255 to vacate and set aside his judgment and conviction on Counts I and II. The Government's Motion to Dismiss this petition was granted in part and denied in part by the Honorable James S. Holden, Chief Judge of the United States District Court for the District of Vermont. (App. pp. 34-45). Thereafter, on June 6, 1974 Chief Judge Holden ordered resentencing under the authority of United States v. Tucker, 404 U.S. 443 (1972), and transfer of the matter to the docket of the

Honorable Albert W. Coffrin for resentencing. (App. pp. 46 and 47). In his Order, Judge Holden stated: " . . . there is no way this Court in the present litigation can determine whether the sentence imposed in 1968 might have been different had Judge Gibson known that some of the previous convictions had been obtained without the aid of counsel under Gideon v. Wainwright, 372 U.S. 335 (1963)."

Thereafter, on August 19, 1974, Judge Coffrin modified the sentence imposed on January 22, 1968, under Count I, to a term of imprisonment for nine years, in lieu of the ten years imposed by Judge Gibson. The same Order acknowledged that the three year concurrent sentence on Count II given by Chief Judge Leddy at a Rule 35 hearing on November 6, 1970 had been served. (App. pp. 53-54).

Thereafter, on September 9, 1974, Pigman took this appeal from Judge Coffrin's Order. (App. p. 55).

ARGUMENT

I. ANY CONSIDERATION GIVEN BY THE SENTENCING JUDGE TO DEFENDANT PIGMAN'S RECORD OF JUVENILE PROCEEDINGS COMPLIED WITH PROPER SENTENCING PROCEDURES BECAUSE:

A. THE RULE OF U.S. v. TUCKER WAS NOT VIOLATED;

B. THE RULE OF IN RE GAULT IS NOT PRESUMED TO BE RETROACTIVE;

C. AT MOST THIS PART OF THE SENTENCING PROCEDURE DEALING WITH JUVENILE PROCEEDINGS CONSTITUTED HARMLESS ERROR.

I.

A. THE RULE OF U.S. v. TUCKER WAS NOT VIOLATED.

The defendant Pigman, in point one of his brief, repeatedly asserts that Judge Coffrin's limited consideration of defendant Pigman's juvenile proceedings (and there appears to be only one proceeding which resulted in Pigman's confinement) at resentencing automatically violated U.S. v. Tucker, 404 U.S. 443 (1972), thus requiring yet another Pigman resentencing. Pigman argues that Judge Coffrin's brief attention to these juvenile proceedings amounts to an "erosion of the Gideon principle" and "misinformation of a constitutional magnitude" used at sentencing, and Tucker therefore compels that Appellant Pigman be resentenced anew. (Br. p. 14).

This argument entirely overlooks Tucker's most meaningful and controlling language, viz: "For the real question here is not whether the results of the Florida and Louisiana proceedings might have been different if the respondent had had counsel, but whether the sentence in the 1953 federal case might have been different if the sentencing judge nad known that at least two of the respondent's previous convictions had been unconstitutionally obtained." U.S. v. Tucker, 404 U.S. 443, 447. Tucker also asserts that the practice there condemned is a sentence "found at least is part upon misinformation of constitutional magnitude." (Id. at 447). "Knowledge" and "misinformation" are the key words of the decision. If the sentencing judge has knowledge of the constitutional infirmities of prior convictions or juvenile proceedings - and if there is no misinformation - and proceeds with sentencing, Tucker is satisfied.

While it can be argued that the late Judge Gibson may have been influenced by misinformation at the initial sentencing, in January 1968, if he relied on prior convictions obtained in violation of the right to counsel guarantee of the Sixth Amendment, this argument is wholly inapplicable to proceedings before Judge Coffrin at resentencing hearings on August 5, 6 and 19, 1974. Judge

Coffrin was fully aware of all constitutional infirmities in prior convictions including juvenile proceedings (if there were any at juvenile proceedings). Judge Coffrin did not act on misinformation, and a fortiori, it certainly cannot be said that he would have given a lesser sentence had he known of any constitutional infirmities in juvenile proceedings since he did know of such infirmities (if there were any).

Accordingly, the sentencing procedure did comply with Tucker insofar as Pigman's juvenile proceedings were concerned.

I.

B. THE RULE OF IN RE GAULT IS NOT PRESUMED TO BE RETROACTIVE.

Pigman's brief assumes In Re Gault, 387 U.S. 1 (1967) has the same retroactive effect as Gideon v. Wainwright, 372 U.S. 335. Gideon was given retroactive effect by the Supreme Court in Pickelsimer v. Wainwright, 375 U.S. 2.

Guidelines governing the retroactive effect of a holding of unconstitutionality were most recently set forth at length by the Supreme Court in Desist v. United States, 394 U.S. 244 (1969) which followed by two years

the decision in In Re Gault. There the Court said:

> Ever since Linkletter v. Walker, 381 U.S. 618, 629 . . . established that 'the Constitution neither prohibits nor requires retrospective effect' for decisions expounding new constitutional rules affecting criminal trials, the Court has viewed the retroactivity or non-retroactivity of such decisions as a function of three considerations. As we most recently summarized then in Stovall v. Denno, 388 U.S. 293, 297 . . . , : 'The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standard, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect in the administration of justice of a retroactive application of the new standards. Foremost among these factors is the purpose to be served by the new constitutional rule.' Id. at 249.

Comparing this foremost factor to the two cases, the purpose to be served by Gideon was to correct the Supreme Court's twenty year earlier decision, Betts v. Brady, 316 U.S. 455 (1942), and require that states afford the same right to counsel for defendants charged with state crimes, under the 14th Amendment, as the Federal Courts had always given federal defendants under the Sixth Amendment. The Court's decision in Gideon acknowledges that Betts v. Brady departed from the Court's position in Powell v. Alabama, 287 U.S. 45, handed down

in 1932, and that the right to counsel in state cases should be reaffirmed.

In short, the purpose in Gideon was retrospective - to reassert the rule that would always have existed but for Betts v. Brady.

In Re Gault, it is submitted, by its language has a prospective purpose. The decision is largely devoted to a history of juvenile court procedures in this country which reaches the conclusion that while juvenile proceedings were initially instituted to provide custody by the state in lieu of the parent, the time has come to acknowledge that an adversary proceeding, with right of counsel, is now consistent with such juvenile proceedings. The Gault decision notes that many states now provide the very counsel right afforded by the decision, and that the right of counsel to juveniles is supported by the report of the President's Crime Commission. Id. at 38.

Accordingly, the purpose of Gault is prospective. There is nothing in the decision which required the disturbing of Pigman's juvenile proceedings which occurred more than fifteen years prior to Gault.

I.

C. AT MOST THIS PART OF THE SENTENCING PROCEDURE DEALING WITH JUVENILE PROCEEDINGS CONSTITUTED HARMLESS ERROR.

Judge Coffrin's entire reference to defendant's juvenile proceedings, as appears of record, is a follows:

> THE COURT: I'm eliminating from consideration the following four juvenile convictions in which Mr. Pigman states that he was unrepresented by counsel, August 18, 1951, for larceny. February 8, 1952, threat to his stepmother. April 30, 1952, disturbing the peace. September 29, 1952, larceny, fighting and similar matters, and I understand these are the only four juvenile convictions that Mr. Pigman had. Is that correct?
>
> MR. HARLOW: Yes, Your Honor.
>
> THE COURT: As part of the defendant's family background, I'm taking note of those convictions merely as a showing general pattern of instability in defiance of authority during the defendant's juvenile years, but just solely as the general pattern may disclose and not taking into fact that he was convicted without benefit of counsel.
>
> * * *
>
> THE COURT: Also, I feel constrained to note the defendant's past record based solely upon those convictions in which he was represented by counsel, and disregarding entirely those in which he was not so represented, and disregarding those in which he as (sic - was) a juvenile or which occurred while he was in the service is considerably less than impressive, and little assistance to his cause when it comes to consideration as to the sentence which should be imposed upon him.

App. pp. 71-72.

If all language in the above abstract of the sentencing proceedings is properly construed, it seems clear that Judge Coffrin eliminated from consideration everything relating to juvenile proceedings which would violate Tucker, even under defendant's interpretation of Tucker. Judge Coffrin states that he is eliminating from consideration any convictions, as such, during Pigman's juvenile years, and that he is only noting the same as indicating that Pigman's family background shows his defiance of law in his juvenile years. Since three of the four juvenile records show no convictions but merely the entry "referred to probation officer", these records do not indicate that commitment did or could result. In fact, these records indicate to the contrary. Accordingly, under both Gault and Argerslinger v. Hamlin, 407 U.S. 25, 40, counsel was not required to be appointed at the first three proceedings. Hence, any consideration given by Judge Coffrin to juvenile proceedings was justified. In the overall picture, any consideration given to the fourth proceeding involving commitment was harmless error in light of the three other proceedings.

On the basis of the foregoing, it is the Government's position that Judge Coffrin did not err at resentencing in his limited consideration of Pigman's juvenile record.

II. THE REDUCTION OF PIGMAN'S SENTENCE FROM TEN YEARS TO NINE YEARS WAS PROPER EVEN THOUGH PIGMAN'S SUBSEQUENT CONVICTIONS WERE CONSIDERED IN HIS REDUCTION OF SENTENCE.

Defendant Pigman's second point of his brief appears to be a novel one. He argues that Judge Coffrin at resentencing could not consider two breaking and entering convictions, occurring a few months after Pigman's parole in January 1972, nor his federal parole violation, in reducing the sentence from ten years to nine years.

All cases cited by the defendant Pigman are cases where the Court refused to allow an actual increase in sentence, declaring the same to be in violation of the double jeopardy provision of the Fifth Amendment. The condemned increase of sentence in cases cited by defendant are as follows: Ex Parte Lange, 18 Wall. 163 (1874) which increased a penalty of imprisonment or fine to imprisonment and fine; United States v. Sacco, 367 F.2d 368, 369 (2d Cir. 1966), which increased sentence of five years plus five years, total ten years, to seven years plus five years, total twelve years; United States v. Walker, 346 F.2d 428 (4th Cir. 1965) which increased a sentence of three years to a five year suspended

sentence and thereafter sentenced the defendant to five years for probation violation; Borum v. United States, 409 F.2d 433 (D.C. Cir. 1967) which increased a sentence being served concurrently with an existing sentence to a sentence to be served consecutively to the existing sentence; Chandler v. United States, 468 F.2d 834, (5th Cir. 1972) which increased a three year sentence on Count II to five years, and Whaley v. North Carolina, 379 F.2d 221 (4th Cir. 1967) which increased four sentences providing for maximum incarceration of ten years to twenty years.

Accordingly, all of the authority cited by Pigman relates to cases where sentences were in fact increased, thereby violaing the double jeopardy provision of the Fifth Amendment.

It is submitted that these cases are not justifiable analogies for Pigman's proposition that his nine year reduced sentence might have been less had Judge Coffrin refused to consider Pigman's conduct since the initial sentence by Judge Gibson in 1968.

A similar analogy which surely would follow from this premise is that a Federal Parole Board could not consider any conduct adverse to a prisoner since the prisoner might be required to serve longer than he would

but for consideration of the adverse matter. Certainly, this is not double jeopardy, nor is it double jeopardy where a sentence is not reduced as much as it might have been because of recent adverse conduct.

Further, it could hardly be argued that the reverse would be true, namely, that a Judge on resentencing could not take into consideration mitigating factors involving a prisoner's conduct since initial sentencing, which factors would dictate a greater reduction in sentence than would otherwise occur.

The purpose of Ex Parte Lange is clear: No man may be punished twice for the same offense. In the instant case, Pigman is not being punished twice as he would be had his sentence been increased to eleven years (assuming eleven years was not above the maximum). Instead, he may not have been given as much a reduced sentence as he would otherwise have received.

As Judge Coffrin stated at the resentencing hearing, in citing North Carolina v. Pearce, 395 U.S. 711 (1969):

> It would be unrealistic in resentencing of this nature not to consider . . . events which throw new light upon the defendant's health habits, conduct and mental and moral

propensities particularly when considered as also stated in Pearce in light of prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime. (App. p. 71).

The criteria to be used by the trial judge at sentencing is expounded at length by Justice Black in Williams v. New York, 337 U.S. 241 as follows:

> But both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.
>
> * * *
>
> Highly relevant - if not essential - to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics.
>
> * * *
>
> Undoubtedly the New York statutes emphasize a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime. People v. Johnson, 252 N.Y. 387, 392, 169 N.E. 619. The belief no longer prevails that every offense in a like legal category calls for an identical punishment with regard to the past life and habits of a particular offender . . . Todays philosophy of individualizing sentences makes sharp distinctions for example between first and repeated offenders. Indeterminate sentences the ultimate termination of which are sometimes decided by non judicial agencies have to a large extent taken the place of the

> old rigidly fixed punishments. The practice of prosecution which relies heavily on non-judicial implementation has been accepted as a wise policy. Execution of the United States parole system rests in the discretion of an administrative parole board . . . Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence. Id. at 247 and 248.

The Second Circuit has also spoken in similar language to the procedures and considerations to be followed at sentencing. In United States v. Doyle, 348 F.2d 715 (2d Cir. 1965), Judge Friendly stated:

> The aim of the sentencing Court is to acquire a thorough acquaintance with the man before it. Its synopsis should include the unfavorable, as well as the favorable data, and few things could be so relevant as other criminal activity, particularly activity closely related to the crime at hand . . . . Id. at 721.

In United States v. Sweig, 454 F.2d 181 (2d Cir. 1972), Judge Hayes summarized the general areas of proper inquiry by the sentencing judge as follows:

> These contentions are without merit. A sentencing judge has very broad discretion in imposing any sentence within the statutory limits, and in exercising that discretion he may and should consider matters that would not be admissible at a trial. Williams v. Oklahoma, 358 U.S. 576, 79 S. Ct. 421, 3 L. Ed. 2d 516 (1959)(hearsay); Williams v. New York, 337 U.S. 241, 69 S. Ct. 1079, 93 L.Ed. 1337 (1949)(prior crimes for which defendant was not tried, and hearsay); United States v.

Schipani, 435 F.2d 26 (2d Cir. 1970), cert. denied, 401 U.S. 983, 91 S. Ct. 1198, 28 L. Ed. 2d 334 (1971)(evidence obtained in violation of fourth amendment); United States v. Doyle, 348 F.2d 715 (2d Cir.), cert. denied, 382 U.S. 843, 86 S. Ct. 89, 15 L.Ed. 2d 84 (1965)(charges dismissed without adjudication of mertis). Id. at 184.

Based on the foregoing, it is clear that Judge Coffrin's consideration at resentencing of Pigman's 1972 convictions while on parole did not result in an increase in his ten year sentence and were otherwise proper matters for the Court to consider under the sentencing guidelines established in New York v. Williams, supra and subsequent Second Circuit cases in implementation thereof.

Therefore, the nine year sentence was properly imposed.

III. ANY RELIANCE BY THE SENTENCING JUDGE ON THE TRIAL JUDGE'S OBSERVATION THAT CO-DEFENDANT RATHBURN AND PIGMAN WERE RING LEADERS WAS PROPER.

Pigman complains that Judge Coffrin's reliance on Judge Gibson's comment at his sentencing in 1968 that Pigman along with Rathburn were leaders "of these five or more" (App. p. 64) constitutes misinformation of a constitutional magnitude, under U.S. v. Tucker, 404 U.S. 446 (1972), and therefore, another sentencing must occur.

Pigman relies on United States v. Powell, 487 F.2d 325 (4th Cir. 1973).

It is submitted that there was no error of constitutional magnitude in making the co-leader observation, and that United States v. Powell is distinguishable from the present case.

Firstly, it is to be noted that Judge Gibson based his statement that from what he observed at the trial, and at the sentencing, Pigman was a leader, along with Rathburn, ". . . that is my judgment from watching you here and watching you during the trial - that is my judgment, you and Rathburn were the ring leaders." (App. p. 64). Again, at the resentencing, Judge Coffrin merely endorsed what Judge Gibson had said. "Based upon his observation of him at the time of sentencing and during the trial, was of the opinion that he (Pigman) was one of the leaders of the group with which he was associated." (App. p. 71).

It is apparent that neither Judge Gibson nor Judge Coffrin indicated that this statement was based on other than Judge Gibson's observations at the trial and at sentencing. Defendant's lengthy summary of testimony relating to Rathburn on page 27 of his brief should not be used to challenge the accuracy of Judge Gibson's

observations during trial and at sentencing. As defendant points out on page 24 of his brief, the two young co-defendants, Kloberdance, age 21, and Van Blericom, age 22, informed the probation officer that the "entire scheme was planned by Rathburn and Pigman". Certainly, this statement, plus Judge Gibson's observations, was enough to justify whatever limited weight the connotation "one of the leaders" may have had in causing Rathburn and Pigman to receive identical sentences. It is to be naturally inferred that the two mature men, Pigman, age 29, and Rathburn, age 35, dominated a scheme also involving two youths, 21 and 22 years of age, and a 19 year old girl (co-defendant Mary Lee Butts).

Secondly, it is pointed out that the situation in United States v. Powell, 487 F.2d 325, on which defendant Pigman relies, presented a situation easily distinguishable from the instant case.

In the Powell case, Powell was jointly indicted with his mother and two brothers on several counts of receiving and concealing stolen vehicles which had travelled in interstate commerce. Powell was tried separately from his mother and brothers and was convicted on one count, and was given a five year sentence. Powell's mother was acquitted and his brothers were given sentences of 18 months and 30 months.

At Powell's sentencing, in meting out the five year sentence, the Court said that Powell was the ringleader and was responsible for getting his two brothers in trouble. On appeal, Powell contended that this "ringleader" charge was misinformation of a constitutional magnitude, requiring resentencing. In agreeing, the Fourth Circuit Court of Appeals acknowledged "these were the sole reasons cited by the Judge for sentencing Powell to a prison term twice as long as that imposed on one of his brothers . . ." Id. at 328.

It is obvious that both Judge Gibson and Judge Coffrin relied on many other factors than the "ringleader charge" in sentencing Pigman to ten and nine years, respectively, which sentence compares more closely with Rathburn's ten years than the five year sentences given Kloberdance and Van Blericom. Both Judge Gibson (tr. p. 1078 - 1087) and Judge Coffrin covered many more items than the assertion that Pigman was a leader. Specifically, Judge Gibson inquired into Pigman's family background, noting that he had eight children and a wife which he did not support and who lived on assistance (tr. 1081), and inquired of his juvenile record, his adult record, his other than honorable discharge from service, and that the

fruits of the crime, in which Pigman was a co-conspirator, was in many instances used to buy firearms.

Additionally, Judge Coffrin clearly considered many factors in addition to the observation of Pigman's leadership role in reducing the sentence from ten years to nine years. Judge Coffrin's explanation is substantially as follows:

> These guns, if not actually in defendant's possession clearly must have been in the possession of the co-conspirators and the defendant must have been aware of that fact. I'm also considering that Judge Gibson, who sat through the lengthy trial . . . thought the evidence of the defendant's guilt to be overwhelming. Based upon his observation of him at the time of sentencing and during the trial, was of the opinion that he was one of the leaders of the group with which he was associated. The weight and credibility to be afforded the evidence, and the witnesses is particularly for the evaluation of the trial judge in matters of this sort for obvious reasons. I feel constrained to note the defendant's expressed desire to return to society and this expressed willingness to become a good and law abiding citizen, if permitted to do so fails significantly in light of his experience of just over two years ago when he was permitted this opportunity and failed to take advantage of it. Also, I feel constrained to note the defendant's past record based solely upon those convictions in which he was represented by counsel, and disregarding entirely those in which he was not so represented, and disregarding those in which he as (sic - was) a juvenile or which occurred while he was in the service is considerably less than impressive, and little assistance to his cause when it comes to consideration as to the sentence which should be imposed upon him. (App. pp. 71, 72).

Judge Coffrin went on to specifically delineate what his considerations were in sentencing Mr. Pigman:

> [O]ne [the] presentence report after disregarding those items which I stated earlier, I stated I would eliminate from consideration, Two, the nature of offense involved. Three, Judge Gibson's remarks at the time of imposition of the original sentence, disregarding those remarks which had to do with defendant's earlier convictions, which Judge Gibson stated he was considering. Four, Defendants Nebraska convictions in 1972 resulting in violation of his parole term. Five, the traditional sentencing considerations of punishment, deterrents, both general and specific, and rehabilitation, I reached the conclusion that the sentence as to Count I of the indictment should be, instead of ten years, should be nine years . . . . (App. pp. 72 - 73).

It is abundantly apparent from the foregoing that Judge Coffrin relied on many more criteria than Judge Gibson's observation regarding Pigman's co-leader role in reducing sentence. United States v. Powell is readily distinguishable since there the judge relied solely on the ringleader assertion. Id. at 328.

Consequently, any reference to Pigman as a leader was justified, but was also de minimis since many other factors entered into the determination of Pigman's nine year sentence.

IV. THERE IS NO UNJUST DISPARITY BETWEEN PIGMAN'S NINE YEAR SENTENCE AND THE TEN YEAR SENTENCE RECEIVED BY CO-DEFENDANT RATHBURN, AND THE FIVE YEAR SENTENCES RECEIVED BY CO-DEFENDANTS KLOBERDANCE AND VAN BLERICOM.

Defendant Pigman argues that he should be re-sentenced because it was unjust for Judge Coffrin to sentence Pigman to a term of imprisonment of more than the five years given co-defendants Kloberdance and Van Blericom. Pigman contends that these two co-defendants, particularly Kloberdance, were involved in the underlying criminal conduct to the same extent as Pigman, and hence Pigman's sentence of four years in addition to the five year sentence given Kloberdance and Van Blericom "must have arisen from the Judge's improper consideration of the false ringleader charge". (Def. Br. p. 34).

At best, this is a highly unwarranted assumption. No authority need be cited for the proposition that to treat Kloberdance and Pigman as subjects suitable for equal sentences violates a most basic premise of penology, namely, that a young adult offender (Kloberdance, age 21) should not be subjected to the same standards at sentencing as a 29 year old man (Pigman). Kloberdance and Van Blericom were little more than juveniles; Pigman and Rathburn were over 29 years of age at sentencing.

Essentially, Pigman asks that the sentence of nine years be further reduced because it is excessive when compared to the sentences received by co-defendants. Pigman claims that he has been singled out for greater punishment.

In United States v. Holder, 412 F.2d 212, 214 (1969), this Court restated its authority to review sentences on appeal as follows:

> Our power to review a sentence imposed by a district judge is extremely limited. See, e.g., United States v. Sohnen, 280 F.2d 109 (2d Cir. 1960); United States v. Lo Duca, 274 F.2d 57 (2d Cir. 1960); see, generally, Wright, Federal Practice and Procedure §533 (1969). The fact that we might well have imposed a less severe sentence would not warrant our vacating the sentence that was imposed and remanding the case for imposition of a new one. If the sentence could be characterized as so manifest an abuse of discretion as to violate traditional concepts, it is possible that we might, pursuant to our power to supervise the administration of justice in the circuit, overturn our long established precedents of non-intervention and intervene. Id. at 214.

This language has essentially been related by this Court more recently in McGee v. United States, 462 F.2d 243 (1972), McGee v. United States, 465 F.2d 357 (1972) and United States v. Brown, 479 F.2d 1170 (1973). The test is: Did the trial judge so manifestly abuse his discretion in sentencing Pigman to nine years that traditional concepts of justice are violated. In reply

to this test, the Government points to a record which shows that Pigman (although perhaps second in command) was one of two leaders of a large criminal undertaking, in the eyes of the presiding judge and two of his co-conspirators; that he was a 29 year old adult who had been involved in antisocial or criminal acts rather regularly for over 16 years; that he was part of a conspiracy which invoked upon a nationwide spree of passing forged instruments, known to have been stolen, during which co-conspirators assembled a substantial arsenal of guns; that he had deserted his wife and eight children in pursuit of his criminal acts and failed to support them; that he possessed an other than honorable discharge from the armed services; [illegible] he was convicted of two charges of breaking and entering within a few months after being granted probation in 1972; that he along with Rathburn undoubtedly contributed to the delinquency of a 19 year old girl (co-defendant Mary Lee Butts) who was used as a passer of forged securities, as well as to the delinquency of two youths, age 21 and 22; and that the presiding judge considered his guilt as overwhelming.

Based on this background, Judge Gibson properly associated together Pigman and Rathburn as warranting the longer sentences, Kloberdance and Van Blericom as warranting a medium length sentence, and defendant Mary Lee Butts

as warranting the lesser sentence, namely treatment as a youthful offender. Judge Coffrin, after disregarding convictions in violation of Tucker, further sentenced Pigman consistent with his background and role in the matter and with the sentences of co-defendants when he reduced the sentence from ten years to nine. Also, against the foregoing background, Pigman is readily distinguishable from Wiley, in United States v. Wiley, 278 F.2d 500 (7th Cir. 1960), upon which Pigman relies in his brief. Pigman was anything but the "minor defendant" which the Court had in mind in Wiley.

Accordingly, the sentence was not arbitrary as to defendant Pigman when taking into consideration his role in the criminal enterprise, and the sentences given to the other four defendants.

CONCLUSION

The action of Judge Coffrin below complied with proper sentencing procedures, and should be affirmed.

Respectfully submitted,

George W. F. Cook

GEORGE W. F. COOK
United States Attorney

December 27, 1974

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JACK REX PIGMAN,

Defendant-Appellant

CERTIFICATE OF SERVICE

I do hereby certify that on the 27th day of December, 1974, I made service of the BRIEF FOR THE UNITED STATES upon Jack Rex Pigman, defendant-appellant, by mailing copies of same, postage prepaid, to Frederick deG. Harlow, Esquire, 98 Merchants Row, Rutland, Vermont 05701, attorney of record for said defendant-appellant.

George W. F. Cook

GEORGE W. F. COOK
United States Attorney

Address:

P.O. Box 10
Rutland, Vermont 05701

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JACK REX PIGMAN,

Defendant-Appellant

CERTIFICATE OF SERVICE

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